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No. _____

In The

Supreme Court of the United States

October Term, 1986

DAN L. BOLDEN,
Petitioner,

-vs-

JOHN MERLO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER *SANDSTROM* v *MONTANA*, 442 US 510 (1979) SHOULD BE APPLIED RETROACTIVELY?

II.

WHETHER THE JURY INSTRUCTION, ALTHOUGH VIOLATIVE OF *SANDSTROM* v *MONTANA*, 442 US 510 (1979), WAS HARMLESS BEYOND A REASONABLE DOUBT?

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DAN L. BOLDEN,
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-vs-

JOHN MERLO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed September 18, 1986, and is reported at __ F2d __ (1986). The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 27, 1985. The decision of the United States Court of Appeals for the Sixth Circuit was filed September 17, 1985. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed January 28, 1985. Copies of all these opinions are included in the Appendix to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed September 18, 1986. The jurisdiction of this Court is invoked under 28 USC 1254(1). The decision of the Court of Appeals is based on *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979); *Rose* v *Clark*, 476 US ___; 106 S Ct 3101; 92 L Ed 2d 460 (1986); and *Conway* v *Anderson*, 698 F2d 282 (CA 6, 1983); *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision this petition involves is the Due Process Clause, which is:

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Respondent Merlo was convicted in state court of first-degree murder, MCLA 750.316, in 1967 by a jury trial. Merlo was sentenced to mandatory life imprisonment and has been incarcerated since his conviction. The

Michigan Court of Appeals affirmed his conviction in an opinion which found the evidence of premeditated murder to be overwhelming. *People* v *Merlo*, 23 Mich App 694, 703 (1970). The Michigan Supreme Court denied Merlo's delayed application for leave to appeal on October 27, 1975. A 1977 application for writ of habeas corpus was denied. The jury instruction now in question was not challenged in any of these proceedings.

In 1982, Respondent first raised the *Sandstrom* violation in a delayed motion for new trial. The motion was denied. In mid-1983, the Michigan Court of Appeals denied his delayed application for leave to appeal. The Michigan Supreme Court denied leave in late 1983.

The United States District Court first granted Respondent's writ of habeas corpus in January, 1985. The district court found the jury instruction violated *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979), and that this error was not harmless. On appeal, the Court of Appeals, without ruling on harmless error, remanded to the district court for consideration of procedural default. The district court found the state courts had not relied on Respondent's failure to object to preclude state court appellate review, and that *Wainwright* v *Sykes*, 433 US 73; 97 S Ct 2497; 53 L Ed 2d 594 (1977), did not apply. The district court again granted Respondent's application for writ of habeas corpus. The Court of Appeals affirmed the district court. Petitioner, Warden Bolden, now seeks review of the decision of the Court of Appeals.

At trial, Merlo did not contest the fact that he shot his wife four times in the beauty shop where she was working. As defense counsel stated in a pretrial motion, "The facts are such that the shooting is hard to be denied, and the defense must be that there was no premeditation." (R, 99)

Rose Marie Schmidt, a beauty shop customer, saw Merlo arrive. (R, 111) Merlo and his estranged wife, Sharon, a hairdresser, went into the furnace room. (R, 113) The doors to the furnace room were open. Merlo and his wife were back there about five minutes or so. Rose Marie was five feet from the open doors but did not hear any sounds. (R, 114) Sharon came out and went to work on another customer. Merlo came out and shot Sharon. He fired two of the shots after Sharon was on the floor. (R, 115) Merlo walked out of the shop. His gait was normal. (R, 115)

Another customer, Diane Brennan, also saw Merlo walk into the shop and go into the back room with his wife. (R, 160) Merlo and the victim were very quiet. (R, 164) Diane tried to listen to their conversation. (R, 181) She saw Merlo shoot his wife. Merlo was three to four feet from the victim, used a chrome pistol, and never said a word. (R, 166)

Andrea Pojarski was a hairdresser in the shop. (R, 188) She saw Merlo come in, she exchanged casual greetings with him. (R, 189) Andrea heard Sharon ask Respondent, "What are you doing here? Why don't you go home?" (R, 190) Andrea saw Sharon come out of the back room. Andrea did not see Merlo come out right after Sharon. Andrea heard the shots but did not watch the shooting. (R, 192)

Sylvia Stewart, a customer, saw Merlo come in. (R, 212) She was aware that Merlo and the victim had gone into the back room. (R, 215) She heard the shots. (R, 213)

Martha Stanfield owned the beauty shop. She knew Merlo and saw him come in. (R, 217) They exchanged greetings. (R, 218) Merlo motioned for Sharon to come to the back room. Nothing appeared unusual. (R, 219)

Prior to Merlo's arrival, Sharon had spilled water on the floor. Martha went into the back room where Merlo and Sharon were to get towels. Merlo and Sharon were just standing there. (R, 219-220) At one point, Sharon came out of the back room, got a cigarette, and returned to the back room. Martha heard Sharon use the word "car." (R, 223) Martha described Merlo's behavior that day as normal, quiet and courteous. (R, 233) Martha did not see any spit on Merlo's face nor any slap marks. (R, 238)

Sharon's customer, Lois Whitaker, saw Merlo come in the door. (R, 242) After Sharon and Merlo had been in the back room, Sharon came out first and just began working on Lois. (R, 244) Merlo came out of the back room and was two feet from Lois's chair when he began shooting Sharon. (R, 245) Sharon started slumping and Merlo shot some more. (R, 246) When Merlo stood in front of Lois's chair, his arm was extended and the gun was in his hand. There were no marks nor any spittle on Merlo's face. (R, 266) Merlo had put a bullet on the seat of Sharon's car about three weeks before the shooting. (R, 258)

Dr. Richard E. Oleson testified that Sharon Merlo had been shot four times. One shot struck the midline front of her skull. It severed the brain stem, causing instant death. (R, 151-152) One shot struck at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. (R, 151-152) Either of these shots would have been fatal. (R, 153) Two more shots struck in the front abdomen. There were corresponding exit wounds. (R, 151) Merlo was in the army for three years and knew how to use firearms. (R, 419)

About three weeks after the murder, Merlo was arrested in Philadelphia by a bank detective when Merlo

attempted to cash a forged check. Merlo was carrying the murder weapon when he was arrested. (R, 303, 315)

Merlo confessed to the Philadelphia authorities that he had shot his wife four times. He said she was working on a lady's hair when he fired. (R, 343-345)

Diane Wilshire, Sharon's sister, testified that Merlo hit Sharon once and broke her glasses. Merlo was not barred from the house (where Sharon lived with her parents). Merlo always left the house quickly so he could avoid being served with the divorce papers. (R, 414) Merlo visited Diane in the hospital and showed her his gun. He told her he was not afraid of anyone. (R, 415)

Respondent Merlo testified that prior to the murder he saw his wife's car parked at her boyfriend's apartment. Merlo smashed up the dashboard of his wife's car and pulled out the spark plug wires. (R, 451) He said he used a .38 caliber gun to smash the gauges and the bullet flew out of the gun. He did not leave it on the seat. (R, 515) The day of the murder, he had eight shots and beers in an hour and went straight to the beauty shop. (R, 457) During his talk with Sharon in the back room of the beauty shop, she called him a punk and spit in his face. It enraged him so he shot her. (R, 463-464) The boyfriend was part of it. (R, 538)

Several months after the murder, Respondent telephoned the victim's mother. He said, "I'm not sorry I did it. I warned her ahead of time. I left a bullet in the front seat. I haven't shed a tear over it." (R, 553-554)

JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Federal jurisdiction was invoked in the Court of Appeals under 28 USC 2253.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's first question is whether *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979) should be retroactively applied. The United States Court of Appeals for the Sixth Circuit has given *Sandstrom* full retroactive effect. *Conway* v *Anderson*, 698 F2d 282 (CA 6, 1983); *cert den* 462 US 1121; 103 S Ct 3092; 77 L Ed 2d 1352 (1983). The position of the Sixth Circuit conflicts with the holding of the Michigan Supreme Court on this issue. *People* v *Woods*, 416 Mich 581 (1982). The issue of *Sandstrom*'s retroactivity has never been addressed by this Court.

In the instant case, Respondent Merlo was convicted of first-degree murder in a well-tried case in 1967. One dozen years later, in 1979, the Court decided *Sandstrom*. Almost six years after the decision in *Sandstrom*, the district court, following Sixth Circuit precedent, applied *Sandstrom* retroactively to Respondent.

The Constitution neither compels nor prohibits retroactive application of new constitutional rules. *Linkletter* v *Walker*, 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). In *United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982), this Court established a three-fold test to be applied prior to the *Linkletter* test. The first *Johnson* rule is that a decision of the Court which only applies settled precedent to new fact situations will be retroactively applied. The second *Johnson* rule is that a new rule which is expressly declared to be a clean break from past precedent will be prospectively applied. The third *Johnson* rule is that a decision by this Court that the trial court lacked authority to convict or punish will be retroactively applied.

An application of the *Johnson* rules to *Sandstrom* provides little guidance. None of the three rules precisely fits the holding in *Sandstrom*.

In *Sandstrom*, this Court found a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" improper under the Due Process Clause of the Fourteenth Amendment. A reasonable juror could interpret such an instruction as creating a presumption or as shifting the burden of persuasion to the accused. The goal of *Sandstrom* was to insure that "only the guilty are criminally punished." *Rose* v *Clark*, 478 US __; 106 S Ct 3101; 92 L Ed 2d 460, 472 (1986).

Although *Sandstrom* relies on prior cases which analyzed presumptions in light of the reasonable doubt standard, *Sandstrom* is neither the application of settled precedent to new fact situations nor a clean break with the past. *Sandstrom* relies primarily upon two cases, both of which were decided after Respondent was convicted. These cases are *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), retroactively applied by *Ivan* v *City of New York*, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972) and *Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), held retroactive in *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977). *Winship* held that a conviction may stand only upon proof beyond a reasonable doubt of every fact necessary to show the elements of the crime charged. *Mullaney* struck down rebuttable presumptions which explicitly shifted the burden of proof to the defendant on any element of the crime charged.

Sandstrom represents an evolution of the constitutional principles recognized in *Winship* and *Mullaney*. *Sandstrom* is not an application of settled precedent, a clean break with the past or a challenge to the trial court's authority.

To determine retroactivity, this Court must examine these three factors: 1) the purpose to be served by the new rule, 2) the extent of reliance on the old rule, and 3) the effect on the administration of justice of retroactive application of the new rule. *Stovall* v *Denno*, 388 US 293, 297; 87 S Ct 1967; 18 L Ed 2d 1199 (1967).

The purpose of the rule is to insure that only those who are guilty are criminally punished. In *Rose* v *Clark*, *supra*, this Court examined the possible effect a *Sandstrom* violation might have on a jury verdict to determine whether a harmless error analysis could be applied. This Court recognized that the truth-finding function of the jury is not substantially impaired by a *Sandstrom* violation when it found that a *Sandstrom* violation is not the equivalent of a directed verdict of guilty.

> When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v *Johnson*, 460 US 73, 96-97, 74 L Ed 2d 823, 103 S Ct 969 (1983) (Powell, J., dissenting). In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. See, e.g., *Lamb* v *Jernigan*, 683 F2d 1332, 1342-1343 (CA 11 1982), cert denied, 460 US 1024, 75 L Ed 2d 496, 103 S Ct 1276 (1983). In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt. See *Connecticut* v *Johnson*, *supra*, at 97, 74 L Ed 2d 823, 103 S Ct 969 (Powell, J., dissenting); Jeffries & Stephen, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale LJ 1325, 1388, n 192 (1979).
>
> *Rose* v *Clark*, 97 L Ed 2d 472.

The possibility of unreliable results due to a *Sandstrom* instruction depends upon the unlikely occurrence that an *entire jury* first perceives and then impermissibly interprets a single phrase in lengthy jury instructions. *Sandstrom* represents a situation that is fundamentally different in degree from previous cases where new rules implicating the reasonable doubt standard have received complete retroactive effect. *Winship, supra; Mullaney, supra.*

The difference in degree between the *Sandstrom* instruction rule and the rule in *Winship* and *Mullaney* justifies giving substantial weight to the other two *Stovall* factors, *i.e.*, the extent of reliance on the old rule and the effect of the retroactive application of the new rule on the administration of justice. Consideration of these factors cuts strongly against retroactive application of *Sandstrom. United States* v *Spiegel*, 604 F2d 961, 969 (CA 5, 1979).

In *People* v *Woods*, 416 Mich 581 (1982), the Michigan Supreme Court closely examined *Sandstrom* and its predecessors, *Winship* and *Mullaney*, to determine whether *Sandstrom* should be retroactively applied. The Court first found that *Sandstrom* differed in great degree from *Winship* and *Mullaney* because the "truth-finding function is not substantially impaired in a *Sandstrom* situation." *Woods, supra*, 620. The Court then looked at the other two *Stovall* factors and held:

> The last two factors in the *Linkletter-Stovall* approach are the reliance on the old standards and the effect on the administration of justice. In Michigan, instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, *People* v *Medley*, 339 Mich 486; 64 NW2d 708 (1954); *People* v *Hodges*, 196 Mich 546; 162 NW 966 (1917); and by the

> Court of Appeals, *People* v *Nelson*, 35 Mich App 368; 192 NW2d 682 (1971); *People* v *McBride*, 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> Given this reliance, the effect full retroactivity would have on Michigan's system of justice is unacceptable. Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. Taking this into consideration with the purpose of the *Sandstrom* rule, we feel full retroactivity is unwarranted.
>
> *Woods, supra,* 620-621; footnotes omitted.

The Court then limited the retroactivity of *Sandstrom* to those cases pending on direct appeal when *Sandstrom* was decided. *Woods, supra,* citing *United States* v *Johnson, supra*. In the instant case, Respondent Merlo was convicted in 1967. His conviction was affirmed by the Michigan Court of Appeals in his appeal by claim of right in 1970. His application for leave to appeal was denied by the Michigan Supreme Court in 1975. *Sandstrom* should not be retroactively applied to Respondent. Such a retroactive application of *Sandstrom* puts a heavy burden upon the People of the State of Michigan to retry a murder case after a lapse of nearly twenty years.

The balance of factors favors limited retroactivity at best. *Sandstrom* should not be retroactively applied to cases where the judgment and all direct appeals were final by the date of *Sandstrom*'s decision. This Court should grant this petition for a writ of certiorari and hold that *Sandstrom* is not fully retroactive.

II.

The second question presented by Petitioner asks this Court to review the Sixth Circuit's application of *Rose* v *Clark, supra,* to the facts of this case. In *Rose* v *Clark,* this Court recognized that a *Sandstrom* violation may have very little effect on a jury verdict because a jury cannot presume malice from predicate facts without first finding those facts beyond a reasonable doubt. *Rose* v *Clark,* 97 L Ed 2d 472. In the instant case, the Sixth Circuit merely recited the evidence presented on both sides, said it was "balanced" and affirmed the district court in a published decision. A misapplication of *Rose* v *Clark* by the circuit to which that very case was remanded could have a far-reaching negative effect. To preclude this possibility, this Court should review the facts of the instant case in light of *Rose* v *Clark, supra.*

The victim, Sharon Merlo, was a hairdresser in a beauty shop in Farmington Township, Michigan. On the morning of January 6, 1967, Sharon Merlo, four customers, the beauty shop owner, another hairdresser, and the young son of one of the customers were in the shop. Respondent Merlo walked into the shop. When the owner asked him how he was, he said he was fine. He motioned to Sharon to go into the back room with him. The back room had two doors; both remained open while Merlo was in the shop.

Sharon followed Merlo into the room, came back out shortly after that, lit a cigarette, and returned to the room. Merlo and Sharon were in the room about five minutes or so. During this time, they remained close to the open doors. While they were in there, the owner went in the room twice and the other hairdresser went in once. Neither of these two women nor any of the cus-

tomers ever heard any loud talking or shouting. No one heard any slaps.

Sharon came out of the back room, went to her customer, got behind the customer's chair, and put her hand on the customer's shoulder. By this time, Merlo had *walked* out of the back room and was standing two feet in front of the customer's chair. His arm was extended before him. He fired four shots in all, two of them after Sharon was either on the floor or slumping down.

Respondent *walked* out of the shop, drove his rented car to Cleveland where he abandoned it. (R, 345) He took a train to New York, changed trains, and arrived in Philadelphia less than 24 hours after shooting his wife. (R, 345) He checked into an inexpensive hotel. (R, 345) He was arrested about three weeks later in a Philadelphia bank while attempting to cash a forged check. (The reason for his arrest was not put before the jury.) Merlo confessed to the Philadelphia police that he shot his wife four times. He was carrying the murder weapon when he was arrested.

About two months before the murder, Sharon had filed for divorce. After this, Merlo saw his wife's car parked near her boyfriend's apartment. He smashed up the gauges on the dashboard and pulled out the spark plug wires. He left a .38 caliber bullet on the front seat as a warning. Merlo testified he always carried ten shells for his .38 in each pocket. (R, 514)

Also prior to the murder, Merlo visited Sharon's sister, who was in the hospital giving birth. Merlo showed her his gun and said he was not afraid of anyone. Merlo also said he would kill himself if Sharon would not come back to him.

Merlo had moved back to his hometown of Niles, Ohio, after his wife filed for divorce. (R, 454) He sold the .38 in Niles and bought a .32. (R, 515) He rented a car, drove to Michigan after work on Friday evening, January 5, 1967. (R, 456) He stayed in a motel that night. (R, 456) Sometime between 10:30 and 11:00 the next morning, Merlo shot his wife four times with the .32.

One entry wound was at the midline front of her skull. It severed the brain stem, and caused instant death. A second entry wound was at the midline base of the neck at the upper end of the breast bone. It passed through the large artery from the heart and through the windpipe. This shot would have been fatal by itself. There were two entry wounds to the front of the abdomen with corresponding exit wounds. Merlo was familiar with guns — he was in the army for three years.

Merlo testified he had consumed eight shots and beers before going into the beauty shop. There was no testimony that he smelled of alcohol. There was no testimony that he staggered. His walk was described as normal. Merlo testified that he and his wife argued in the back room, she slapped him and spit in his face. No one heard any loud talking or shouting. No hairdryers were going. (R, 120) There was no testimony that anyone heard any slaps. No one saw any marks on Merlo's face. No one saw any moisture on Merlo's face.

Merlo testified that when his wife called him a punk and spit in his face, it enraged him so he shot her. Testimony showed that when Merlo caught his wife and her boyfriend necking in a car, Merlo stuck his head in the window to inquire how they were doing (R, 436) and if they were having fun. (R, 506) Merlo never said the amount of alcohol he consumed in any way affected his

ability to reason. It apparently did not affect his flight to Philadelphia, either.

Merlo's confession to the Philadelphia authorities did not include any reference to arguing or to being slapped or spit upon.

Merlo's defense rested solely upon his own testimony. The only portion of his testimony corroborated by any other witnesses concerned his statement that he would kill himself if Sharon did not come back to him.

Merlo said he drank eight shots and beers immediately prior to entering the beauty shop. No one testified that he smelled of alcohol or that his speech was slurred. His walk was normal.

Merlo said Sharon enraged him by calling him names, spitting on him and slapping him. No one heard any quarreling. No one heard any slaps. Merlo bore no slap marks nor spittle on his face when he walked out and gunned down his wife.

The jury in the instant case did not believe Merlo's testimony. If even one juror had believed Merlo's testimony, the jury could not have found the existence of the facts that here showed intent beyond a reasonable doubt.

This case was well tried. The evidence shows this was a planned, deliberate murder. Merlo had a .38 caliber pistol. He showed that pistol to his wife's sister. He left a .38 caliber bullet as a warning on his wife's car seat. Then he moved to Ohio, sold the .38, and he bought a .32. He rented a car and drove from Niles, Ohio to Detroit, Michigan after work on Friday evening. He shot his wife four times the next morning and eluded capture for about three weeks. His voluntary statement to police omitted any and all reference to what he would offer at

trial as his defense. The testimony of eyewitnesses did not corroborate a single point of Respondent's defense. No rational juror could have concluded that Respondent lacked a premeditated and deliberate intent to kill. The *Sandstrom* violation committed at this trial was harmless beyond a reasonable doubt.

In *Francis* v *Franklin*, 471 US __; 105 S Ct 1965; 85 L Ed 2d 344 (1985), the Court found an instruction which shifted the burden of proof to the defendant to be violative of *Sandstrom*. The court below had found that the *Sandstrom* violation could not have been harmless error. The defense was accident, and the evidence of intent was not overwhelming. This Court affirmed the Court of Appeals on the harmless error question, noting that "[t]he primary task of this Court upon review of a harmless error determination by the Court of Appeals is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis* v *Franklin*, 85 L Ed 2d at 361, n 10. It does not appear from the Sixth Circuit's opinion that the court "undertook a thorough inquiry" into the evidence. The opinion merely recites the evidence and calls it "balanced" despite the lack of corroboration of Merlo's testimony and the existence of testimony that disputes Merlo's claimed intoxication and provocation. The Sixth Circuit's "analysis" is incorrect under *Rose* v *Clark*, *supra*.

> We agree that the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court. See id., at __, 92 L Ed 2d 480-481. Harmless error analysis addresses a different question: what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome?
>
> *Rose* v *Clark*, 92 L Ed 2d 473, n 11.

In addition to a thorough review of the evidence of intent, Petitioner contends that the record should be examined in other respects as well. Whatever instructions were given to the jury should be reviewed and the *Sandstrom* instruction must be viewed in the context of all the instructions that were given. *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1973).

The instruction given in the instant case which was found to violate *Sandstrom* is:

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, *unless the contrary appears from the evidence*, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, *unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely*. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used.
>
> (R, 601-602)

The italicized portions of the instruction condition the finding of guilt upon a review of the evidence. Petitioner

contends these italicized portions are rhetorically inconsistent with the constitutionally infirm portions of the instruction. *Sandstrom*, 442 US 518, n7. These conditional clauses cut in favor of finding the *Sandstrom* violation to be harmless error beyond a reasonable doubt. These conditional clauses guarantee that the jury found the predicate facts constituting intent.

The Sixth Circuit never considered the full instruction to the jury in the instant case. This instruction included intoxication and its potential to preclude the formation of the necessary intent. (R, 600-601, 605) The trial court instructed the jury on provocation and how it reduces murder to manslaughter. (R, 599-600) The jury was instructed that the burden of proof was on the prosecutor to establish guilt beyond a reasonable doubt. (R, 596) The trial court, after defining common law murder, instructed the jury:

> If you come to the conclusion that the Respondent is guilty of murder, as I have defined it, it will be your duty to determine whether he is guilty of murder in the first or murder in the second degree. The difference between murder in the first degree and murder in the second degree is this: Murder in the first degree is a killing done wilfully and with premeditation, while in murder in the second degree the element of premeditation is absent. To convict the Respondent of murder in the first degree, it must appear that the killing was wilful and premeditated. It is not necessary that any definite period of time should have elapsed between the forming of such intention and the shooting which killed deceased, provided the shooting was premeditated and the Respondent acted wilfully.

> On the other hand, if the killing was done under a sudden impulse, without premeditation or previously formed intention, the offense would be murder in the second degree. As I have stated before, the difference between the two offenses is that, in murder in the first degree the element of premeditation is present, while in murder in the second degree it is not.
>
> (R, 597-598)

In *Francis* v *Franklin, supra,* Justice Powell wrote a dissenting opinion. Justice Rehnquist, with whom Chief Justice Burger and Justice O'Connor joined, also dissented. Both dissents examined the challenged instruction in the context of all the instructions as a whole. Both dissents found that the other instructions prevented the challenged instruction from impermissibly shifting the burden of proof to the defendant. The dissenting opinions held the challenged instruction consequently did not violate *Sandstrom* v *Montana, supra.*

In the instant case, the type of analysis used in the dissenting opinions of *Francis* v *Franklin, supra,* applied to the whole jury instruction in the instant case, will result in a finding that the *Sandstrom* violation was harmless beyond a reasonable doubt.

The Sixth Circuit applied *Rose* v *Clark* incorrectly. This Court should grant this petition for a writ of certiorari and hold the *Sandstrom* violation was harmless beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the United States Court

of Appeals for the Sixth Circuit, or, in the alternative, summary reversal of the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

L. BROOKS PATTERSON (P18708)
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS (P22365)
CHIEF, APPELLATE DIVISION

By: /s/ MARGARET G. HORENSTEIN (P30263)
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DATED: November 13, 1986

APPENDICES

• • •

APPENDIX A

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed September 18, 1986)

(JOHN MERLO, Petitioner-Appellee, v. DAN L. BOLDEN, Respondent-Appellant — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 86-1118)

Before: KEITH and MERRITT, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

The Oakland County Prosecutor appeals from an order of the district court granting petitioner John Merlo's petition for a writ of habeas corpus. The district court found that Merlo's conviction for murdering his wife was obtained through a jury instruction which impermissibly shifted the burden of proof on the element of *mens rea* in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). For the reasons that follow, we affirm.

I.

On January 13, 1984, petitioner John Merlo filed a petition for a writ of habeas corpus alleging denial of effective assistance of counsel and violation of due pro-

cess and the right to a fair trial with respect to five specific jury instructions. On December 20, 1967, Merlo was convicted of first-degree murder and sentenced to life imprisonment without possibility of parole. The conviction was affirmed, *People* v. *Merlo*, 23 Mich. App. 694 (1970), and, in 1975, a delayed application for leave to appeal was denied by the Michigan Supreme Court. At this point the alleged *Sandstrom* error on which the district court granted relief had not been raised. In 1977, Merlo filed a petition for writ of habeas corpus in federal district court but was unsuccessful.

The *Sandstrom* issue was first raised in Merlo's delayed motion for new trial on November 4, 1982, which was denied. On June 13, 1983, the Michigan Court of Appeals denied leave, and, on December 29, 1983, the Michigan Supreme Court denied leave to appeal.

At his trial, petitioner Merlo did not contest the fact that he shot his wife four times in the beauty shop where she was working. As defense counsel stated in a pretrial motion, "the facts are such that the shooting is hard to be denied, and the defense must be that there was no premeditation." In his opening statement, defense counsel indicated that defendant's defense would be lack of premeditation.

Rose Marie Schmidt, a beauty shop customer, saw petitioner Merlo arrive at the beauty shop. Merlo and his estranged wife, Sharon, a hairdresser, went into the furnace room, located at the back of the beauty shop. According to Rose Marie, the doors to the furnace room were open and Merlo and his wife remained in the room for about five minutes. Rose Marie was five feet from the open doors but she did not hear any sounds. Sharon walked out of the room first and went to work on another customer. Rose Marie then saw Merlo walk out and shoot Sharon, firing two of the shots after Sharon

was on the floor. Rose Marie observed that Merlo's gait was normal as he walked from the furnace room.

Another customer, Diane Brennan, also saw Merlo walk into the shop and go into the back room with his wife. Diane tried to listen to their conversation, but Merlo and his wife were very quiet. Diane also saw Merlo shoot his wife. She observed that Merlo was three to four feet from the victim, used a chrome pistol, and never said a word.

Andrea Pojarski was a hairdresser in the shop. She saw Merlo come in and exchanged casual greetings with him. Andrea heard Sharon ask him, "What are you doing here? Why don't you go home?" Andrea saw Sharon come out of the back room but did not see petitioner come out right after Sharon. Andrea heard the shots but did not watch the shooting.

Martha Stanfield owned the beauty shop. She knew Merlo and saw him come in. Although Merlo motioned for Sharon to come to the back room nothing appeared unusual. Prior to Merlo's arrival, Sharon had spilled water on the floor. Martha went into the back room while Merlo and Sharon were there to get towels. Merlo and Sharon were just standing there. At one point, Sharon came out of the back room, got a cigarette, and returned to the back room. Martha only heard Sharon use the word "car." Martha described Merlo's behavior that day as normal, quiet and courteous. She did not see any spit on Merlo's face nor any slap marks. Martha testified that police detectives were watching the beauty shop for a few weeks prior to the murder because Merlo had threatened to come to the shop and kill himself.

Sharon's customer, Lois Whitaker, also saw Merlo come in the door. After Sharon and Merlo had been in the back room, Sharon came out first and began

working on Lois. Then Merlo came out of the back room and was two feet from Lois's chair when he began shooting Sharon. According to Lois, Sharon started slumping and Merlo shot some more. When Merlo stood in front of Lois's chair, she observed that his arm was extended and the gun was in his hand. She saw no marks nor any spittle on Merlo's face. Lois further testified that she had heard a story that Merlo had put a bullet on the seat of Sharon's car about three weeks before the shooting.

Bank detective Frank Morris, who apprehended Merlo in Philadelphia, testified that Merlo laughed and stated, "[t]he papers quote me as a nonchalant killer." Merlo confessed that on the day of the murder he drank whiskey at a bar from 10 to 11 a.m., then went to the beauty shop where he talked to his wife "trying to get her to go back with him."

Robert Payton testified that he was seeing Sharon Merlo prior to the birth of her son, and, in October 1966, four weeks after the birth. After Sharon filed for divorce, Payton saw her a few times a week, picking her up at her parents' house. Sharon told Payton that Merlo had threatened to go to the beauty shop and shoot himself.

Diane Wilshire, Sharon's sister, testified that Merlo visited her in the hospital in December 1966, and that he had a gun with him. She also testified that Merlo once hit Sharon, breaking her glasses.

John Merlo gave the following testimony at the trial. He and Sharon were married in April 1966, and their son was born in September of that year. On October 13, 1966, he and Sharon had an argument and Sharon threw him out of the house, which was her mother's. On October 29, Sharon and John went to a drive-in where

Sharon told John she wanted a divorce. Apparently, Merlo returned to the house and was thrown out again on November 5. On November 7, Merlo saw Payton and Sharon "necking" in a parked car in front of the house. Merlo confronted the two and told Sharon, "no dating." Merlo had returned to his car and was slowly pulling away when Sharon ran up to the car, reached in the window, and slapped Merlo. Merlo then stopped the car and chased Sharon. When he caught her he "slapped her a couple times," breaking her glasses.

Merlo left for his hometown of Niles, Ohio, but returned to Michigan on December 14, with a gun. He visited Sharon's sister in the hospital and told her that he would use the gun on himself if he did not get Sharon back. Merlo then called his mother-in-law and told her that he was going to go to the beauty shop and kill himself if he did not get Sharon back. Merlo next went to Payton's apartment looking for Sharon and Payton. They were not there, but Merlo waited in the parking lot for them to return. While waiting, he saw Sharon's car at a nearby gas station. Merlo smashed the dashboard of the car and pulled out the spark plug wires. Merlo testified that he did not place a bullet on Sharon's car seat at that time, but that one just flew out when he was smashing the dashboard with his gun.

On January 6, 1967, Merlo went to the bar next to the beauty shop and had about eight drinks. He then went into the beauty shop, intending to shoot himself if Sharon would not come back to him. Sharon refused to go back to Merlo and told him "why don't you leave," and "get out of here, punk." Sharon complained about what Merlo did to her car, spit in his face, shoved him up against the wall, and said "get the hell out of here, punk. Get out of my life." Merlo testified that when he

shot his wife he was in a rage and that part of the reason he killed her was because she had a boyfriend.

Merlo's mother-in-law, Lillian Kamen, testified as a rebuttal witness that after the killing Merlo called her and said "I'm not sorry I did it. I warned her ahead of time. I left a bullet in the front seat." Kamen also testified that Merlo had called her previously and told her he planned to go to the beauty parlor and kill himself.

After both sides had rested, the defense sought to have the case dismissed on the ground that there was insufficient evidence of premeditation. The defense counsel told the court "that the Defendant's position in this case was that he had had enough to drink where he wasn't in full control of his facilities and that further that when she spit in his face, that he lost his head and was provoked into such a state of mind that he didn't have enough time to control this excited mind and walked right behind her to where she sat down and got shot." The court denied the motion for dismissal.

The trial court subsequently gave the following jury instruction, which the parties agree violates the rule of *Sandstrom* v. *Montana:*

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then *it will be presumed that death of the deceased was designed by the slayer,* unless the facts and circumstances of the killing, or the evidence, create a

> reasonable doubt whether the killing was done purposely. (Emphasis added).

On January 27, 1985, the district court granted Merlo's petition for a writ of habeas corpus. The district court found that this instruction violated due process under *Sandstrom* and found that, because Merlo's sole defense was lack of intent, the error was not harmless. Respondent appealed and, on September 1, 1985, we remanded the case to the district court to determine whether Merlo was barred from maintaining this action due to a procedural default. In our unpublished opinion we stated that "[c]ounsel for the State conceded at oral argument that the . . . jury instruction . . . is unconstitutional," and concluded that "[c]ounsel's concession leaves as the major issue on appeal the question" of procedural default. *Merlo* v. *Bolden*, No. 85-1145 (6th Cir. Sept. 17, 1985). On December 27, 1985, the district court ordered the writ granted, holding that the state had never raised the issue of procedural default in the state courts but instead had addressed the issue solely on the merits.

II.

The state argues that Merlo's failure to raise the *Sandstrom* issue on direct appeal in the state courts should bar him from raising the issue now absent a showing of cause and prejudice. It is clear that a petitioner must demonstrate cause and prejudice when a state court denies relief due to procedural default. *Gilbert* v. *Parke*, 763 F.2d 821, 824 (6th Cir. 1985). Further, "where the state argues both the merits and the procedural default in its state court brief and where the state court decision does not indicate whether the court relied upon the procecdural default, the procedural

default must be regarded as a substantial basis of the state court's decision." *Id.*

In this case, however, the district court found that "respondent concedes that the prosecutor did not expressly raise the procedural default issue in his responsive brief before the Michigan Court of Appeals or the Michigan Supreme Court." Accordingly, the district court properly concluded that since procedural default was not argued in the state courts, the state courts denied relief based on the merits of Merlo's claims. The state, by failing to assert procedural default, waived the right to assert it as an independent ground to support Merlo's conviction. We discern no error in the district court's analysis.

III.

The dispositive questions in this case are whether a *Sandstrom* error can ever be considered harmless when the defendant has contested the element of intent, and, if so, whether the *Sandstrom* error in the present case was in fact harmless.[1] The recent Supreme Court decision of *Rose* v. *Clark*, 106 S. Ct. 3101 (1986) is dispositive on the former question and instructive on the latter.

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[1] Two subsidiary issues are raised by the parties. First, Merlo argues that all issues with respect to the appeal except for the procedural default issue were decided by the panel which first heard the case. This argument can be rejected because the panel never discussed whether the *Sandstrom* error was harmless or not, and the issue of procedural default appropriately precedes such consideration. Second, the State argues that *Sandstrom* should not apply retroactively to cases in which the judgment and all direct appeals were final by the date of *Sandstrom*. At the same time, the State recognizes that we have given *Sandstrom* full retroactive effect. "Retroactive application of *Sandstrom* has been recognized in this Circuit since the instructional error would normally affect a defendant's right to a fair trial and impact upon the ultimate issue of innocence or guilt." *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir.), *cert. denied*, 462 U.S.

(*concluded on page A-9*)

In *Rose*, the Court resolved the question which it had failed to resolve in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983): "whether the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), applies to jury instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Francis* v. *Franklin*, 471 U.S. __, 105 S. Ct. 1965, 85 L.Ed.2d 39 (1985)." *Rose*, 106 S. Ct. at 3103 (footnote omitted). The court reviewed the general principle first recognized in *Chapman* v. *California*, 386 U.S. 18 (1967), "'that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt,'" *id.* at 5025 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. __, __, 106 S. Ct. 1431, 1436 (1986)), and noted that this principle had been applied to myriad constitutional errors. The Court further recognized, however, that there are certain constitutional errors which render a trial so fundamentally unfair that they necessarily require reversal without regard to the evidence in the record.[2] However, those errors, as the Court explained, "are the exception and not the rule." *Rose*, 106 S. Ct. at 3106. The Court observed that the purpose of many criminal trial rules is to ensure a fair trial and concluded that "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable

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(*continued from page A-8*)

1121 (1983) and cases cited therein. Subsequent cases have applied *Sandstrom* retroactively. *Logan* v. *Abshire*, 778 F.2d 283 (6th Cir. 1985); *Martin* v. *Foltz*, 773 F.2d 711 (6th Cir. 1985). In light of our Circuit precedent on this issue, we have no occasion to reconsider the retroactivity of *Sandstrom*.

[2] Examples of such errors include the use of a coerced confession, *Payne* v. *Arkansas*, 356 U.S. 560 (1958), the complete denial of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and the denial of trial by an impartial judge, *Tumey* v. *Ohio*, 273 U.S. 510 (1927). *See Chapman*, 386 U.S. at 23 n. 8.

doubt, the interest in fairness has been satisfied and judgment should be affirmed." *Id.* at 3107.

The Court found that a *Sandstrom* error is not the kind of error that automatically requires reversal and therefore found "that the error at issue here -- an instruction that impermissibly shifted the burden of proof on malice — is not 'so basic to a fair trial' that it can never be harmless." *Id.* The Court accordingly held that the *Chapman* harmless error standard applies to all cases involving *Sandstrom* errors.[3]

In so holding, the Court rejected the approach which this court had taken in the decision below. In *Clark* v. *Rose*, No. 84-5744 (6th Cir. April 1, 1985), we held that because the defendant had contested the issue of intent at trial, the *Sandstrom* error could not be harmless. *See Rose*, 106 S. Ct. at 3105. For support for this proposition, we relied on Circuit precedent, namely, *Engle* v. *Koehler*, 707 F.2d 241, 246 (6th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 1 (1984). *Id. Engle* held that certain *Sandstrom* errors could be harmless and set forth the following analysis:

> If the defendant acknowledges that an intentional, malicious killing occurred and only claims nonparticipation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

Engle, 707 F.2d at 246. This analysis was based on *Conway* v. *Anderson*, 698 F.2d 282 (6th Cir.), *cert. denied*,

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[3] The Court did not conclude that all *Sandstrom* errors are necessarily harmless. It merely concluded that the traditional *Chapman* harmless error analysis may be applied to determine whether an erroneous *Sandstrom* instruction is in fact harmless under the circumstances.

462 U.S. 1121 (1983) (observing the extremely prejudicial effect of a *Sandstrom* error where the defendant challenged the element of *mens rea*), and was approved in *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985) (finding a *Sandstrom* error to be harmless because the *sole* question at trial was whether the defendant was a participant in the crime).

The Supreme Court in *Rose* expressly rejected this court's analysis in vacating our decision. The Court stated:

> our harmless cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." . . . The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." . . . Thus, the fact that respondent denied that he had "an intent to do any injury to another," . . . does not dispose of the harmless error question.

Rose, 106 S. Ct. at 3109 (citations omitted).

Thus, to the extent that *Conway*, *Engle* and *Martin* instruct that a *Sandstrom* error cannot be harmless where a defendant challenges the element of *mens rea*, they are modified by *Rose* and no longer represent the correct statement of the law in this Circuit. In light of *Rose*, our determination of whether a *Sandstrom* instruction is harmless will no longer be "largely a function of the defense asserted at trial." *Engle*, 707 F.2d at 246; *see also Conway*, 698 F.2d at 285. Rather, we will apply the traditional *Chapman* harmless error analysis to determine whether the record, examined in its entirety, establishes

guilt beyond a reasonable doubt. The specific inquiry in a *Sandstrom* case will be "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Connecticut* v. *Johnson*, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting) (approved in *Rose* v. *Clark*, 106 S. Ct. at 3109).

Applying this standard to the present case, we cannot say that the instant *Sandstrom* error was harmless beyond a reasonable doubt. Merlo was convicted of first degree murder which proscribes "wilful, deliberate and premeditated murder." Mich. Comp. Laws Ann. § 750.316. Merlo's theory at trial was that he had gone to the shop to shoot himself, had made prior threats to shoot himself in the shop, and, in a drunken condition, was incited to shoot his wife by her verbal and physical abuse. Merlo introduced evidence at trial to support this theory. The state's theory, also supported by the evidence, was that Merlo had previously abused his wife, had left a bullet in her car as a warning, was jealous of her relationship with her new boyfriend, and shot her with the requisite intent of premeditation. Of course, the mere fact that Merlo disputed the element of intent is not dispositive. However, the evidence is in such a balanced state that we cannot say beyond a reasonable doubt that it "was so dispositive of intent . . . that the jury would have found it unnecessary to rely on the presumption" created by the erroneous *Sandstrom* instruction. *Connecticut* v. *Johnson*, 460 U.S. at 97 n. 5 (Powell, J., dissenting). We therefore cannot conclude that the *Sandstrom* error was harmless.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division — Flint)

(Filed December 27, 1985)

(JOHN MERLO, Plaintiff-Appellee, v. DAN BOLDEN, Defendant-Appellant — NO: 84-CV-[8]023-FL)

Before the Court are the parties' supplemental briefs on the procedural default issue which is the only remaining issue in this action. The basic "ground rules" which guide the Court in analyzing this issue were fully set forth by the Sixth Circuit Court of Appeals in *Meeks* v. *Bergen*, 749 F.2d 322 (6th Cir. 1984). In *Meeks*, the Court recalled that in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977),

> The Supreme Court held that a defendant who failed to comply with state rules of procedure governing the timely presentation of federal constitutional claims forfeited the right to federal habeas corpus review of those claims absent a showing of 'cause for noncompliance [with state procedure] and some showing of actual prejudice resulting from the alleged constitutional violation.'

The Court went to note that:

> *Sykes*, however, does not bar federal habeas corpus relief merely upon a showing that an adequate procedural ground was available to support a conviction; rather *Sykes* mandates that it must

> be demonstrated that the state court had *relied* upon a procedural default. Where a state appellate court did not rely on the procedural default, but reached the merits of a claim, the *Sykes* bar is inapplicable. The rationale of this rule requires that in instances where the state courts themselves decline to honor a procedural bar, the federal courts do no damage to precepts of comity and federalism by similarly addressing the merits of a claim.

Meeks at 325 (citations omitted.)

Finally, the Court restated its holding in *Raper* v. *Mintzes*, 706 F.2d. 161 (6th Cir. 1983), which set forth the standard to be applied in determining if the state court relied upon a procedural default where the basis of the state court's decision is unclear.

> Where the basis for the state court's decision is unclear, we believe that the federal habeas court must look to the arguments presented to the state court. *See, Martinez* v. *Harris*, 675 F.2d. 51 (2d Cir. 1982). In *Martinez*, the Second Circuit announced the following rules for ascertaining the basis of the state court's decision: (1) if the state prosecutor only argued the merits of the petitioner's claim before the state court and failed to raise the procedural default issue, the federal court may assume that the state court ruled only on the merits; (2) if the prosecutor relied solely on the procedural default, the federal court may assume that that was the only basis for the state court's decision; and (3) if the prosecutor argued in the alternative, the federal court may assume that the state court did not rely solely on the merits unless it says so. *Id.* at 54-55.

Meeks, at 325-26.

As set forth in this Court's original Memorandum Opinion and Order, the procedural history of this case is as follows: Petitioner was convicted of first degree murder, MCLA § 750.316, on December 20, 1967, following a jury trial in the Circuit Court for the County of Oakland. The Michigan Court of Appeals affirmed his conviction on his appeal as of right on May 25, 1970 in a published opinion, *People* v. *Merlo*, 23 Mich.App. 694 (1970). Petitioner's delayed application for leave to appeal to the Michigan Supreme Court was denied October 27, 1975. Petitioner filed an application for a writ of habeas corpus in 1977 which did not raise any of the issues contained in this application. On November 4, 1982, petitioner's delayed motion for a new trial raising the six issues he seeks to present in this habeas corpus application was denied. The Michigan Court of Appeals denied his delayed application for leave to appeal on the same six issues in an order dated June 17, 1983 which stated:

> In this cause a delayed application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto by the Court,
>
> IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

The Michigan Supreme Court denied his late application for leave to appeal on the same six issues in the following order dated December 29, 1983.

> On order of the Court, the delayed application *in propria persona* for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Obviously, this Court must apply the *Raper* standard to determine whether the state appellate courts relied upon a procedural default. The respondent concedes that the prosecutor did not expressly raise the procedural default issue in his responsive brief before the Michigan Court of Appeals or the Michigan Supreme Court. Instead, the respondent argues that the prosecutor raised the procedural default issue by implication on page 6 of the brief in response to petitioner's delayed application for leave to appeal to the Michigan Court of Appeals. Respondent points to the following language which addresses petitioner's ineffective assistance of counsel claim.

> In the instant case, the applicable prong of the two part *Garcia* test is that a (sic) mistake. Therefore, because of the overwhelming evidence of Defendant's guilt, it cannot be said that but for *trial counsel's request that these instructions be given*, Defendant would of (sic) had a reasonably likely chance of acquittal.

Respondent's argument does not support his assertion. Actually, respondent is claiming that since petitioner's counsel requested the unconstitutional instructions, it would be illogical for the prosecutor to raise the argument that the failure to object to the instructions waives petitioner's rights to challenge them on appeal. Instead of implicity raising the procedural default defense, this argument asserts that procedural default is not even applicable. As such, it clearly misses the point. First, if such is actually the case, the state has no more business arguing procedural default here than the prosecutor had in the state appellate courts. Second, the court sees no difference between a situation where defendant requests the instruction, and therefore does not object, and where defendant agrees with the instruction requested

by the prosecution and therefore does not object. In either situation, it is the *failure to object* which favors the basis of the procedural default concept.

Finally, the record before this Court does not support the respondent's claim that petitioner's trial counsel requested the constitutionally infirm instructions, rather, the record merely reveals that the instructions were read without objection. (Trial Tr. pp. 601-06) Accordingly, this issue should be treated as, and indeed actually is, a procedural default issue. Therefore, the Court concludes (1) that the prosecutor could have raised the procedural default issue in the state courts, (2) that he failed to do so, choosing instead to deal with the merits of the case. Having so concluded, the court can assume under *Raper* that the state courts ruled only on the merits. Accordingly, *Wainwright* v. *Sykes* does not apply to the instant action. Because it has already been determined that the instructions at issue here are unconstitutional under *Conway* v. *Anderson*, 698 F.2d 282, 284 (6th Cir. 1983) and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioner's request for a writ of habeas corpus is hereby GRANTED, and a conditional writ of habeas corpus shall be issued allowing the State of Michigan 90 days to begin a new trial. If the state does not do so, petitioner shall be unconditionally released at that time.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: December 27, 1985

APPENDIX C

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals for the Sixth Circuit)

(Filed September 17, 1985)

(JOHN MERLO, Petitioner-Appellee v. DAN BOLDEN, Respondent-Appellant — ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN; No. 85-1145)

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge.

This is a Michigan habeas corpus case based on a jury conviction in 1967 for first degree murder. The defendant shot and killed his estranged wife. His defense was sudden impulse and lack of premeditation; he admitted the facts of the killing. In his petition, he argues that the jury instruction on presumed intent improperly shifted the burden of persuasion. He did not object to the instructions at trial, on direct appeal, or in an earlier habeas corpus petition or delayed motion for a new trial. The District Court granted the defendant's conditional writ of habeas corpus requiring the State to commence trial within 90 days. The state appeals.

Counsel for the State conceded at oral argument that the following jury instruction, as the District Court found, is unconstitutional under the rule of *Conway* v.

Anderson, 698 F.2d 282, 284 (6th Cir.), *cert. den.*, 103 S.Ct. 3092 (1983), and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979):

> *The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts*, and if, a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then *it will be presumed that death of the deceased was designed* by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such a manner that the natural, ordinary, probable use of such deadly weapon in such manner would be to take life, *the law presumes that such person so assaulting intended to take life*. A deadly weapon has been defined as an instrument reasonably calculated and likely to produce death, or serious bodily injury from the manner in which it is used. (Emphasis added.)

(Transcript, Vol II, pp 601-602.)

Counsel's concession leaves as the major issue on appeal the question whether a Michigan procedural default rule bars consideration of defendant's habeas corpus claim because of the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 (1974).

In the court below the state extensively briefed and defended on the basis of the *Wainwright* doctrine. Without mentioning or discussing this defense, the District Court issued the writ. On appeal, the state con-

cedes the correctness of the District Court's *Sandstrom* holding but takes issue with the result on the *Wainwright* question which the District Court did not discuss or pass on.

Since the District Court has not passed on this procedural default issue under *Wainwright* the case must be remanded to the District Court for consideration of this issue in light of Michigan law concerning procedural default, as well as consideration of any factual issues arising under *Wainwright*'s "cause and prejudice" standard.

Accordingly, it is so ORDERED.

ISSUED AS MANDATE: October 23, 1985
COSTS: NONE

(Certification Omitted)

APPENDIX D

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division — Flint)

(Filed January 28, 1985)

(JOHN MERLO, Petitioner, v DAN BOLDEN, Respondent — NO: 84-CV-8023-FL)

I

Petitioner John Merlo, a prisoner at the Kinross Correctional Facility at Kincheloe Airforce Base, Michigan, has brought this application for a writ of habeas corpus pursuant to 28 USC § 2254. He was convicted at a jury trial on December 20, 1967 in the Circuit Court for the County of Oakland of first-degree murder, MCL 750.316. The Michigan Court of Appeals affirmed his conviction on his appeal as of right on May 25, 1970 in a published opinion, *People* v *Merlo*, 23 Mich App 694 (1970). Petitioner's delayed application for leave to appeal to the Michigan Supreme Court was denied on October 27, 1975. (Court of Appeals Docket No. 5278.) Petitioner filed an application for a writ of habeas corpus in 1977 which did not raise any of the issues contained in this application.

On November 4, 1982, petitioner's delayed motion for a new trial (raising the six issues he seeks to present in this habeas corpus application) was denied. The Michigan Court of Appeals denied his delayed application for leave to appeal on the same six issues in an order dated June 17, 1983. (Docket No. 68975.) The Michigan Supreme Court denied his late application for leave to appeal on

the same six issues in an order dated December 29, 1983. (Docket No. 72007.) Petitioner filed the instant application for writ of habeas corpus on January 13, 1984.

II

The following issues are raised:

A. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the law presumes every person intends the natural consequences of his conduct.

B. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the law presumes an intent to murder from the use of a deadly weapon.

C. Petitioner was deprived of a fundamentally fair trial by the jury instruction that the jury must acquit petitioner of first-degree murder before considering lesser offenses.

D. Petitioner was deprived of a fundamentally fair trial by the jury instruction that malice may be implied from the doing of a cruel act.

E. Petitioner was deprived of a fundamentally fair trial where the jury instructions taken as a whole shifted the burden of proof unto the defendant.

F. Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel.

Petitioner alleges that he was deprived of a fundamentally fair trial by the trial court's use of unconsititutional presumptions in instructing the jury on the issue of intent. The prosecution must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 US 358 (1970), petitioner was charged with first-degree

murder, MCL 750.316. Under Michigan law, first-degree murder has a specific intent element known as "malice aforethought." *People* v *Johnson*, 93 Mich App 667, 287 NW2d 311 (1979).

The element of intent ". . . cannot be taken from the trier of fact through reliance on a legal presumption . . ." *Sandstrom* v *Montana*, 442 US 510, 523 (1979).[1] This type of presumption is constitutional error whether it is conclusive on the issue of intent or simply transfers the burden of proof to the defendant. *Sandstrom*, at 524; *Burton* v *Bergman*, 649 F2d 428, 431 (CA 6, 1981), *vacated and remanded on other grounds*, 456 US 953 (1982).

In petitioner's case, the jury was told,

> The law presumes that every person, unless relieved by some disability as hereinafter mentioned, contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, and if a man is shown by the evidence, beyond a reasonable doubt, to have killed another by an act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that death of the deceased was designed by the slayer, unless the facts and circumstances of the killing, or the evidence, create a reasonable doubt whether the killing was done purposely. When a man assaults another with, or uses upon another a deadly weapon, in such manner would be to take life, the law presumes that such person so assaulting intended to take life. A deadly weapon has been defined as an instrument reasonably calculated

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[1] *Sandstrom* has been given retroactive effect by the Sixth Circuit. *Williams* v *Engle*, 683 F2d 152 (CA 6, 1982), *Krzeminski* v *Perini*, 614 F2d 121 (CA 6), *cert den'd*, 449 US 866 (1980).

> and likely to produce death, or serious bodily injury from the manner in which it is used.

(Transcript, Vol II, pp 601-602).

The above instruction is, with the exception of the last sentence, identical to the one which was found violative of *Sandstrom* in *Conway* v *Anderson*, 698 F2d 282, 284 (CA 6), *cert den'd*, __ US __, 103 S Ct 3092 (1983). Accordingly, for the reasons set forth in *Conway*, the Court must conclude that the instruction given in the instant case is constitutionally infirm.

This does not end the analysis, however, since *Sandstrom* instructions are subject to the harmless error rule.[2]

"A *Sandstrom* instruction can be deemed 'harmless' only if no rational juror could have concluded from the evidence of record that the perpetrator of the crime lacked the requisite intent." *Conway*, at 285. "Harmless error" analysis must rest upon the particular facts of record in the defense asserted. *Id*, *cf*. *Krzeminski* v *Perini*, *supra* (defendant admitted the "element" upon which the erroneous instruction was based). Where the asserted defense is lack of intent, a *Sandstrom* instruction has been error simply because the instruction "may have relieved the state of its obligation" even though the proof of intent was substantial. *Burton* v *Bergman*, *supra*. General instructions requiring the jurors to find all elements of the crime beyond a reasonable doubt will not cure a *Sandstrom* error. *Phillips* v *Rose*, 690 F2d 79, 81 (CA 6, 1982). *Contra*, *Roberts* v *Marshall*, 736 F2d 1126 (CA 6, 1984).

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[2] In *Connecticut* v *Johnson*, 460 US 73 (1983), the Supreme Court divided equally on the issue of *Sandstrom*, instructions being treated as "harmless error." Since *Connecticut* v *Johnson*, this circuit has continued to follow its "harmless error" rule set out in *Conway* v *Anderson*, *supra*.

Petitioner's sole defense in this case was indeed "lack of intent." During voir dire, defense counsel said, "the defense *must* be that there was no premeditation." (Tr. Vol I, p. 99). A motion to dismiss after the prosecution's opening statement was based on lack of intent. (Tr. Vol I, p. 107). Defense counsel renewed the motion to dismiss at the close of the prosecutor's proofs. (Tr. Vol I, pp. 371-375).

Defense counsel gave an opening statement which admitted the "killing" but claimed a lack of premeditation. (Tr. Vol II, p. 381). Petitioner testified that he had no intention of killing his wife when he went to her place of employment. (Tr. Vol II, p. 545). Petitioner also testified that before going to see his wife he consumed eight shots of whiskey with beer chasers. (Tr. Vol II, pp. 457, 545-548). Petitioner further claimed that his wife's slapping and spitting on him caused him to go into a "rage." (Tr. Vol II, p. 464). Defense counsel made still another motion to dismiss for lack of intent at the close of his own proofs. (Tr. Vol II, pp. 563-564). Finally, defense counsel's closing argument centered on intent: "I submit that he could not have formed the intent. He could not have premeditated this killing." (Tr. Vol II, p. 564).

While the proof in this case that petitioner murdered his estranged wife is strong, "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v *Naughton*, 414 US 141, 147 (1973); *Henderson* v *Kibbe*, 431 US 145, 154 (1977); *Engle* v *Koehler*, 707 F2d 241, 244-245 (CA 6, 1983); *Phillips* v *Rose*, 690 F2d 79, 81 (CA 6, 1982). [3]

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[3] In light of the Court's rulings, petitioner's remaining claims need not be addressed.

III

Petitioner asked to be relieved "of the unconstitutional restraint upon his liberty." A federal court may use its habeas corpus authority to accomplish justice in its order of relief. *Peyton* v *Rowe*, 391 US 54, 66 (1968). The ends of justice will be met by a conditional writ of habeas corpus being issued allowing the State of Michigan to commence a new trial within ninety days. If the state does not do so, petitioner shall be unconditionally released at that time.

For the foregoing reasons, a conditional writ of habeas corpus will issue. An appropriate order may be entered.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: January 28, 1985